



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL APPEAL NO. 200 OF 2008
H.T. OLE DIEMA

STEPHEN RUKWARO MUNORIA.....APPELLANTS

VERSUS

ELIZABETH KIMORGO.....RESPONDENT

(An appeal from the original judgment and decree in Limuru SRMCC No. 279 of 2006 delivered on 27th March, 2008 by Hon. Mr. V.W. Wandera (S.R..M.))

JUDGMENT

1. The Respondent sued the Appellants claiming compensation for the injury to her right femur which she suffered following an accident that occurred on 1st April, 2006 along Nairobi- Mai Mahiu Road. The Learned trial magistrate heard the matter and entered judgment in the following terms:-

Liability 90% : 10% between the Appellant and Respondent

General Damages KShs. 600,000/=

Less 10 % KShs. 60,000/=

Further medical expense KShs. 150,000/=

Less 10% KShs. 15,000/=

Special Damages KShs. 131,675/=

Less 10% KShs. 13,176/=

Plus costs and interest less 10% contribution.

2. Being dissatisfied with the trial court's judgment, the Appellants filed this appeal on the grounds that:

- i. *The Learned trial Magistrate erred in law by making an award of general damages that is so high as to make it an entirely erroneous estimate.*
- ii. *The Learned trial Magistrate erred in law by acting on the wrong principles and precedents in assessing the general and special damages claim.*
- iii. *The Learned trial Magistrate erred in law and fact by making an award for future medical*

operation when the same had not been specifically pleaded in the plaint and no evidence of such costs was tendered and or proved at the trial.

- iv. *The Learned trial Magistrate erred in law and fact in awarding the sum of Kshs. 131,675/= in special damages when the same was not specifically proved and the documents produced in support thereof were inadmissible in evidence and or of no probative value.*
- v. *The Learned trial Magistrate erred in law and fact by making awards that are wholly against the weight of the evidence.*

3. This being a first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and come to my own independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses testify. (See: **Peter v. Sunday Post (1958) at pg. 429**). It is worth noting that the Appellants' gravamen is on the quantum of damages awarded since a consent was recorded on liability.

4. It was the Respondent's claim that she sustained a fracture of the right femur. On special damages, she pleaded Police abstract Kshs. 200, P3form Kshs. 500, Medical bills at AIC Kijabe Hospital being Kshs. 97,975 and transport to Kijabe Hospital KShs. 33,000/- totalling to KShs. 131, 675/=. She testified that on the day of admission, she underwent a minor surgery and put on traction. Five days later, she underwent a major surgery where metal implants were put on her leg. She was discharged on 11th April, 2006. She stated that she used crutches from the date of discharge to September, 2006. That she continued to undergo treatment as an outpatient. She in that regard produced treatment notes (P. Exhibit 1(a)), Discharge summary (P. Exhibit 1 (b)), and a sick off sheet (P. Exhibit 2). She further stated that she paid a total of KShs. 97,975/= for treatment and produced receipts (P. Exhibit 3(a), (b), (c) and (d)). She stated that reported the accident to Lari Police Station where she was issued with a police abstract at KShs. 200/- (P. Exhibit 4(a) and (b)). She was also issued with a p3 form at Kshs. 500 (P. Exhibit 5(a) and (b)). She was examined by Doctor Barad who prepared a medical report (P. Exhibit 6). She used a taxi and was charged KShs. 33,000/- receipts thereto were produced as P. Exhibit 7 (a) (b) (c) and (e). She indicated that she has not fully recovered from her injury and suffers pain when she sleeps and during cold weather. On cross examination she stated that the hospital gave her a refund of KShs. 4,000/= when she returned the crutches.

5. The appeal was canvassed by way of written submissions. It was the Appellant's submissions that the injury sustained by the Respondent was a simple fracture that healed well without complications and therefore did not warrant the award of KShs.600,000/=. The Appellants contended that the trial magistrate relied on authorities related to more serious injuries for example that of **Philip Kipkemoi Ngeno v. Const Builders & Constructors Ltd HCCC No. 47 of 1999**. Suggesting an award of between KShs. 300,000/- and KShs. 350,000/= the Appellants cited the cases of **Ezra Ondari Okemwa v. John Gicheha Gachinga & Another HCCC No. 1682 of 1992** and **Nairobi HCCC No. 24 of 2000., Jairus Mwanza Kyove v. James Karanja Nguthi** where the Plaintiffs who suffered injuries similar to the Respondent's injury were awarded KShs. 350,000/= and KShs. 300,000/= respectively. The Appellants also took issue with the award of future medical expenses. They contended that the said award was not pleaded and it was not open to court to award it in the circumstances. It was also argued that there was no basis for the trial magistrate's decision to arrive at the figure of KShs. 150,000/= for future medical expenses since there was no such evidence. As for special damages, the Appellants argued that only KShs. 97,975/= was properly pleaded and proved and that of KShs. 33,000/= for transport was not properly pleaded by way of amendment and it was not also properly proved since the receipts produced indicated that the taxi was used by several people. It was further argued that the evidence by the Respondent was not credible for the reason that she did not require five (5) people to support her.

6. The Respondent on the other hand maintained that the award was reasonable. Quoting **Kemfro Africa Limited & Gathongo Kanini v. A.M. Lubia & Olive Lubia (1982-1988) 1 KAR 727** the Respondent submitted that the trial magistrate did not consider any irrelevant matter in awarding damages. It was submitted that in awarding damages, matters such as the age of cited authorities and extent of injury is normally considered. That the cases cited before the trial court were for the years 2003 and 2002 respectively. The Respondent cited **Isaac Keter & Another v. Dismas Wabwire Masinde, C.A. No. 129 of 2002** where the court declined to reduce the award having taken into account the nature of the injuries, the age of the cited cases and the rate of inflation. To justify the award by the trial court the Respondent

cited **Ruth Lilian Nyawira Okoth v. Philip Olago Odeny HCCC No. 1186 of 1996** stating that the plaintiff in this case suffered injuries similar to her's and was awarded KShs. 950,000/=. As for special damages, the Respondent submitted that her Counsel made oral application to amend the plaint and such was done. As for taxi charges, it was submitted that she boarded a taxi in company of her relatives who accompanied her to hospital.

7. The principles to be applied by this court in the circumstances were discussed in **Loice Wanjiku Kagunda -vs- Julius Gachau Mwangi C A No. 142 of 2003 (UR)** where it was held as follows:-

"We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence, an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those or other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (See Mariga -vs- Musila (1984) KLR 257.)"

8. In Butt v. Khan (1981) KLR 349, it was held that this court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate based on some wrong principle or a misapprehension of evidence. I have carefully considered the authorities where the Plaintiff's suffered injuries similar to the Respondent's among them **Martin M. Mugi v. Attorney General (2000) eKLR** where the plaintiff was awarded KShs. 300,000/= as general damages in the year 2000. I find that the award by the trial Court was reasonable taking into account rate of inflation on the Kenyan Shilling, age of cited authorities and the nature of injury sustained. As for the award of future medical expenses, I must agree with the Appellants that the same was not proved. On special damages, it is worth noting that the Appellant's Counsel raised no objection to the Respondent's Counsel oral application to amend the plaint. I therefore decline to interfere with the award for transport. The upshot is that this appeal is partially allowed on the following terms.

a. General Damages	KShs. 600,000/=
b. Special Damages	KShs. 131,675/=
Sub-total	KShs. 731,675/=
Less 10%	KShs. 73,167/=
Total	KShs. 658,508/=

c. Costs of the Appeal

Dated, Signed and Delivered in open court this 6th day of February, 2015.

J. K. SERGON

JUDGE

In the presence of:

Kairainia for the Appellants

Imanyara holding brief for Oyata for the Respondent